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CURRENT TOPICS

Crown Privilege

THE Lord Chancellor went so far in his statement last week on Crown privilege, which we reproduce in full on p. 455 of this issue, that it is all the more regrettable that he could not go one step further and agree that, except in matters affecting national security, Ministers should no longer be the final judges of what should be disclosed in litigation in which their departments are concerned. We agree with the General Council of the Bar and The Law Society that a judge should be entrusted with deciding whether a document or piece of evidence ought to be admitted, provided that the Minister's decision should be final on questions of security. We do not suggest that Ministers and civil servants would try to hide behind the screen of "the proper functioning of the public service," in spite of the very rare and exceptional examples of the abuse of powers which have occurred. In the utmost good faith a Minister may take an ultra-cautious view of the public interest and it is surely right that it should be possible for a judge to correct his view.

Retirement Annuities: Amendments to Finance Bill

SOME of the limitations imposed by the Finance (No. 2) Bill on relief for the retirement provisions made by the self-employed have been, or are to be, modified. In Committee on 12th-13th June the House of Commons accepted an amendment to cl. 18 to bring within the clause a policy which guaranteed the payment of an annuity notwithstanding death for a period not exceeding ten years (instead of five years as proposed). The Committee also accepted an amendment to cl. 19 raising from £500 to £750 the permitted maximum contribution on which relief would be allowed. Equally important were the promises made by the Government to introduce amendments on the Report stage with the objects (i) of including within the scheme persons who, while self-employed, also held pensionable employment, and (ii) of enabling persons born before 1916 to contribute a greater proportion of their relevant earnings than the 10 per cent. limit envisaged in the Bill, up to a maximum of 15 per cent. for those born before 1908. These changes and projected changes go far to meet the criticisms expressed by Sir EDWIN HERBERT elsewhere in this issue, more especially as they affect older entrants and professional men holding part-time salaried posts to which a small pension attaches. All in all, it seems likely that when the Bill emerges from the Committee stage these provisions will approach fairly closely the scheme recommended by the Millard Tucker Committee.

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Divorce : Apportionment of Damages Awarded to Assisted Petitioner

THE June issue of the *Law Society's Gazette* contains advice by the Council to solicitors engaged in legally aided divorce proceedings as to the position which may arise when damages are awarded against a co-respondent in matrimonial proceedings where the petitioner is an assisted person and an application is made to the court by the petitioner for apportionment. Under s. 3 (4) of the Legal Aid and Advice Act, 1949, a charge may arise upon damages so recovered, and solicitors should bear in mind that, where a portion of the damages is ordered to be settled upon children, the operation of this charge may well result in the petitioner receiving no part of the damages, and he may in fact lose financially if the damages apportioned are insufficient to entitle him to a refund of any contribution he has made to the Legal Aid Fund. The Council states that solicitors should ensure that information both as to the probable amount of the net liability of the fund on the assisted person's account and as to the sum paid by way of contribution is available for the judge to assist him, if he requires it, in arriving at the appropriate amount to be apportioned to the petitioner. Solicitors should apply to the Area Committee concerned for information regarding the likely amount of such charge.

Credit for Money's Worth

THERE is always something a little odd about judges bringing the wealth of their learning and experience to bear on questions as to the ordinary meaning of an English word. The music-hall flavour of the joke is apparent in recent deliberations of the Divisional Court on what is a sausage, whether a goldfish is an article, and, more recently,

whether an oxtail is butcher's meat (*Taylor v. R. Gunner, Ltd.*, *The Times*, 6th June). Much more serious was the debate in the Court of Criminal Appeal on 4th June in *R. v. Ingram* on the meaning of the phrase "obtaining credit" in s. 13 of the Debtors Act, 1869. During the argument it seemed to the listener that the court was divided; LORD GODDARD and DONOVAN, J., considered that the words included the procuring of a person's confidence that money's worth, i.e., goods or services, would be delivered. STREATEFELD, J., seemed to incline to the view that the phrase only bore the narrower meaning of procuring confidence that money would be paid. The accused had been found guilty and sentenced to nine months' imprisonment on six charges of obtaining credit by fraud contrary to s. 13 of the 1869 Act. He had received advance payments on his promises to erect neon signs. The jury had been properly directed that they had to consider whether he never had any intention to do the work. The argument for the defence was that "credit" related only to money debts, but the prosecution pointed out that the word "liability" in the section ("if in incurring any debt or liability he has obtained credit . . .") would have no meaning if the word "credit" bore the narrower interpretation. The court dismissed the appeal, holding that the word "liability" as defined in s. 3 of the Debtors Act, 1869, by reference to s. 31 of the Bankruptcy Act, 1869, included any compensation for work or labour done and any obligation or possibility of obligation to pay money or money's worth, and it followed that s. 13 of the Debtors Act, 1869, covered the case of obtaining credit in incurring a liability to render money's worth. In *R. v. Ingram* there was ample evidence of system to prove intention to defraud, but the court's warning against prosecuting for procrastination in doing work or delivering goods indicates how rarely this sort of charge can be expected to be made.

RETIREMENT BENEFITS FOR THE SELF-EMPLOYED

In the following article the provisions of Part III of the Finance Bill are examined from the viewpoint of the professional man by

Sir Edwin Herbert, K.B.E.

PROFESSIONAL people will welcome the provisions of Pt. III of the Finance (No. 2) Bill, 1956, which includes cl. 18 to 21 of the Bill. Unfortunately their welcome will be tempered with regret in view of the fact that the Chancellor of the Exchequer has not seen fit to implement in full the recommendations of the Millard Tucker (No. 2) Committee. Nonetheless the provisions of the Bill go some considerable way towards relieving the problems that have beset self-employed persons.

These problems can be shortly stated as follows. Employers may establish pension schemes for their employees either collectively or individually. Within the limits of schemes approved by the Commissioners of Inland Revenue under one or other of the Finance Acts since 1921 the contributions of the employer, and in case of contributory schemes the contributions of the employee also, have been allowed for tax purposes as deductions from the profits of the employer or the income of the employee as the case may be. In addition the employee has had the same relief in respect of premiums on insurance policies as has been available to other members of the community. The consequence has been that in many respects it has been far more attractive to take employment than to establish an independent private

professional practice. The independent practitioner has had only the relief which is available to everyone in respect of insurance premiums. If he has desired to purchase an annuity to provide for his retirement he has had to provide the premium out of net income after tax. Most professional men have also found it necessary to provide for the capital in their businesses out of net income and in many instances have found it necessary to make provision for payment for goodwill.

With the growing weight of taxation it has become increasingly impracticable for professional men to make provision for all these matters and in addition to maintain themselves and their families. The consequences of this discrimination in favour of the employee and against the independent professional man or other self-employed person have been threefold. The first consequence is that it has become increasingly difficult to maintain the tradition that the professions are careers open to the talents. Brains and character remain essential ingredients in the qualities desired in a young professional man but it has become increasingly necessary to look for people with some financial backing. The number of such people has become small and is likely to become smaller as the years go by and the effect of

increasing death duties becomes more and more marked. The second consequence is that more and more young men and women find it necessary to go into employment, rather than into private practice, employment where they have no capital to find, no goodwill problems and where their pensions are secured by their employers. The third consequence is that many professional men are either staying in practice to an age much too great because they cannot make sufficient for their retirement, thus blocking promotion for the younger men, or, having been in private practice for years, are attracted away to employed occupations.

It is with these problems in mind that The Law Society, in common with other professional bodies, has for a number of years past been making representations to the Chancellor of the Exchequer. These recommendations were first made over eight years ago to Sir Stafford Cripps when he was Chancellor of the Exchequer. It was as a consequence of these representations that the Millard Tucker Committee was set up to inquire both into anomalies in the existing law in regard to employees' pension schemes and also into the possibility of pensions for self-employed persons. It was a matter for congratulation when both the Millard Tucker Committee and, subsequently, the Royal Commission on Taxation recommended that pension schemes should be available to self-employed persons. A minority of the Millard Tucker Committee and also a minority of the Royal Commission recommended that these schemes should be available to professional men only, the schemes to be operated through their professional bodies.

Non-professional self-employed

There is no doubt that the difference between the position of a professional person and other self-employed persons is very great. It may be a difference in degree but it is so important as also almost to be a difference in kind. The professional bodies have always recognised this difference but nonetheless they have felt throughout that to be logical and consistent it was necessary for them to advocate the case of the self-employed generally, and the provisions of the Finance (No. 2) Bill, 1956, do not distinguish between the professional man and the self-employed trader.

The professional bodies cannot and do not object to this. It is unfortunate, however, that the inclusion of the self-employed trader in the scheme of the Bill has had the effect of causing the Chancellor of the Exchequer to introduce certain limitations and restrictions which one may reasonably suspect would not have been introduced if the Bill had been limited to professional self-employed persons.

In this article the provisions of the Bill are examined from the point of view of (a) the benefits that may be provided; (b) the provisions that may be made in order to secure these benefits, and (c) the effect of these provisions from the tax point of view. Lastly, certain inadequacies and omissions are dealt with.

Benefits proposed

The benefits that may be secured take the form of deferred annuities. The annuity may be secured for the benefit of the contributor or for the benefit of the widow or other dependant of the contributor or the benefit may provide for an annuity for the contributor with a survivorship annuity for a widow or other dependant. In this respect the scheme follows closely the normal provisions of an employees' pension scheme. Having regard to the different position of a self-employed person as compared with an employee, however, it has been

necessary to make different provisions as to the period from which the deferred annuity may start. In an employees' pension scheme the pension normally starts from the date of retirement, the date of retirement being fixed by the scheme. Under the Bill a self-employed person, when taking out an annuity contract, may specify what date he likes as the commencing date for the deferred annuity. This commencing date may be at any age with a lower limit of sixty and an upper limit of seventy. In occupations where it is customary to retire early the lower limit may, with the consent of the Commissioners of Inland Revenue, be reduced to fifty-five. Having fixed the particular date at which the deferred annuity will begin the annuity may be drawn by the contributor as from that date whether he continues in his occupation or whether he retires from it. In either event the annuity payable will rank as earned income for tax purposes. There is no limitation on the amount of the annuity that may be secured except the limitation, to which reference is made below, consequential upon the limitations imposed by the Bill in respect of the permitted annual contribution. The whole benefit, however, must be taken in the form of an annuity, no part of it can be commuted or assigned. This follows the general principle recommended by the Millard Tucker Committee and also by the Royal Commission that benefits which have been accumulated out of contributions free from tax shall suffer tax when the benefit becomes payable, whereas benefits which arise from contributions out of income that has suffered tax will be free from taxation when the benefits become payable. It is to be noticed that the benefits do not include any form of death benefit. But there is one useful provision to the effect that the annuity contract may provide that if the contributor dies before the date when the annuity becomes payable he shall be entitled to recover the premiums paid, together with the appropriate rate of interest and in case of a "with profits" contract a proper proportion of the profit. These payments will not attract tax. The contract for the deferred annuity may be made either with an insurance company or through the medium of a private trust fund established on behalf of a substantial proportion of the persons engaged in any particular trade or occupation. This clause is evidently designed to enable professional and other bodies to establish collective schemes for the benefit of their members generally.

Limitations on tax relief*

The amount of the contribution towards the purchase of an annuity which will rank for tax relief is limited to 10 per cent. of the earned income in any year with a maximum of £500. There are provisions which will allow a certain amount of averaging of the earned income as between one year and another. There is, of course, nothing to prevent a self-employed person from contributing a sum in excess of these sums but the amount of the excess will not rank for tax relief. But cl. 22 of the Bill should not be overlooked. In so far as there is a purchased annuity (other than the type of retirement annuity introduced by the Bill) the capital element in that annuity will not be taxable when the annuity comes to be paid. It is evident, therefore, that the three types of relief which will be available when the Bill becomes law provide a considerable amount of flexibility. Provision for retirement may take the form of a life policy in respect of which the ordinary insurance premium tax relief will be available, or it may take the form of a retirement benefit annuity within the provisions of the Bill, in which case the contribution up to a maximum of £500 in any one year will

rank for complete tax relief (both income tax and sur-tax), or it may take the form of a purchased annuity in respect of which the contributions will not rank for any form of tax relief but in respect of which the actual payments when made will carry a substantial element of tax relief. The provision may be made by any one of these means or by a combination of all of them and each professional man will have to study the best form of provision suitable to his own particular circumstances.

The machinery whereby tax relief on contributions to the type of retirement annuity permitted by the Bill will be effected is extremely simple. The amount of the permitted contribution will be deducted from earned income for the purposes of both income tax and sur-tax. That is to say, if a man has an income of £5,000 a year and in respect of that income sets aside £500 for the purpose of providing a retirement annuity, his earned income will be assessed at £4,500 instead of at £5,000, though the figure on which earned income relief will be calculated will remain at £5,000. The provisions of the Bill also make it clear that the interest earned by funds accumulating as a result of the contributions permitted by the Bill (whether those funds are in the hands of an insurance company or in the hands of trustees under a private fund) will be free from income tax and sur-tax.

The persons who may take the benefit of the scheme of the Bill are not, as such, defined. The benefit will be available to all persons who are not members of, or eligible to be members of, an employees' fund. There are certain defects in this method of approach, to which reference is made below.

Some criticisms

It will be evident from the short summary of the provisions of the Bill that the scheme of the Bill not only recognises the principle for which the professional bodies have been contending so long but does also represent an important practical step towards the relief of the problems under which the professional classes have been suffering.

Unfortunately, however, it is not possible to welcome the provisions of the Bill without qualification. Certain serious defects mar the scheme and it is much to be regretted that having accepted the principle the Chancellor of the Exchequer has not been rather more generous in his application of it to the circumstances of self-employed persons.

In the first place the amount of the permitted contribution recommended by the Millard Tucker Committee and by the Royal Commission has been reduced. This is a blemish which ought to be removed.

A worse blemish is the failure of the Bill to give effect to the recommendations of the Millard Tucker Committee with respect to older entrants. Employees' schemes commonly make provision for the making up of back payments by the employer in respect of employees entering the scheme at an age in excess of the normal age of entry. Following that analogy the Millard Tucker Committee recommended that persons who had been in practice for a considerable time before the passing of the Bill authorising schemes for self-employed persons should be permitted to make greater contributions calculated at a higher percentage of their earned income according to a sliding scale. Unfortunately, the Bill contains no special provision for the older entrants. The verdict upon the provisions of the Bill so far as they affect professional men of, say, fifty years of age and upwards must be the same as that upon so many of the operations in the early stages of World War II, "Too little and too late."

Unfortunately, also, the nature of the benefit to be obtained is less favourable than that recommended both by the Millard Tucker Committee and by the Royal Commission in that no form of commutation or capital payment is to be permitted. Employees' schemes approved by the Commissioners of Inland Revenue commonly permit up to one-fourth of the total benefit to be taken as a capital sum. Civil servants and local government employees on retirement normally obtain some form of capital sum in addition to their pension. A self-employed person on retirement will need not only income to live on but some form of capital sum as a reasonable measure of security.

A serious question also arises as to the persons eligible under the scheme of the Bill. As drafted the Bill excludes any person who has any pensionable income, however small a proportion of his total income it may be. This is a serious blemish.

While, therefore, the provisions of the Bill generally should receive a welcome it is to be hoped that during the passage of the Finance Bill through the House of Commons provisions may be introduced which will eliminate the discrimination against self-employed persons which the Bill perpetuates.

DEVELOPMENT PLANS

CITY OF PORTSMOUTH DEVELOPMENT PLAN

On 25th May, 1956, the Minister of Housing and Local Government approved with modifications the above plan. A certified copy of the plan as approved by the Minister has been deposited at the City Development Department, 1 Western Parade, Portsmouth.

The copy of the plan so deposited will be open for inspection free of charge by all persons interested between the hours of 9 in the forenoon and 5.30 in the afternoon on Mondays to Fridays, and 9 in the forenoon and 12 noon on Saturdays.

The plan became operative as from 5th June, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may within six weeks from 5th June, 1956, make application to the High Court.

EAST HAM DEVELOPMENT PLAN

On 22nd May, 1956, the Minister of Housing and Local Government approved (with modifications) the above plan.

A certified copy of the plan as approved by the Minister has been deposited at the offices of the Town Clerk, Town Hall, East Ham, E.6.

The copy of the plan so deposited will be open for inspection free of charge by all persons interested on Mondays between 9 a.m. and 6 p.m., on Tuesdays between 9 a.m. and 5.30 p.m., on Wednesdays to Fridays between 9 a.m. and 5 p.m., and on Saturdays between 9 a.m. and 12 noon.

The plan became operative as from 1st June, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 1st June, 1956, make application to the High Court.

A Conveyancer's Diary

RECEIVER OF MORTGAGED PROPERTY—WHOSE AGENT?

SECTION 109 (2) of the Law of Property Act, 1925, provides that a receiver of mortgaged property appointed under the powers conferred by that Act shall be deemed to be the agent of the mortgagor. This provision was new in 1925, but it had a counterpart in the special provisions to the same effect which a careful conveyancer made it his practice to insert in pre-1926 mortgages, with the object of preventing, so far as possible, a mortgagee becoming by the mere appointment of a receiver of the mortgaged property subject to the onerous burdens which the law places upon a mortgagee in possession. It is a useful provision, as the decision in the recently reported case of *Lever Finance, Ltd. v. Needleman's Trustee* [1956] 3 W.L.R. 72, and p. 400, *ante* (the first, to my knowledge, which touches on it), shows.

A registered charge of certain property contained a provision that the mortgagors should not except with the mortgagees' consent exercise the powers of leasing conferred by the Law of Property Act, 1925, on a mortgagor, "but it shall not be necessary to express such consent in any lease . . . nor shall any lessee be concerned to see that any such consent has been given." The mortgagors, without the mortgagees' consent, granted a lease of the property which eventually became vested in the second (the only effective) defendant. In an action for possession brought by the mortgagees on the breach of this covenant, Harman, J., held that the mortgagees were not entitled to succeed, on the ground that the part of the covenant which I have set out *verbatim* estopped them from asserting that the lease had been granted without their consent. It is difficult to see how these words found their way into the charge. Their effect was to nullify what went before. This part of the decision is not of any general interest because of the unusual nature of this proviso to a covenant in common form and the unlikelihood of its being repeated. But other points were taken on behalf of the lessee which were also dealt with in the judgment, including a point based on the character of a receiver of mortgaged property, and it is with this point that the case assumes a general interest.

Receipt of rent by receiver

There appears to be no previous authority on the question whether the receipt of rent by the receiver of mortgaged property constitutes a recognition by the mortgagee of a tenancy created initially without authority by the mortgagor. The learned judge referred to a case, *Serjeant v. Nash, Field & Co.* [1903] 2 K.B. 304, which is cited in the third edition of Carson's Real Property Statutes as authority for the proposition that receipts by a receiver are not such a recognition; but the case was dismissed as a very unsatisfactory authority for the proposition (it appears to me to have nothing to do with the point at all). But that is of small importance in view of the clear language of s. 109 (2), the effect of which was held to be that a receiver of mortgaged property shall not be the agent of the mortgagee, but shall be deemed to be the agent of the mortgagor. (The actual decision on this point of the learned judge is expressed rather tentatively—"I think that there is a good deal to be said for the view," etc.—but this is preceded by an unequivocal statement that on the true construction of the subsection a receiver is not an agent of the mortgagee, and that is the thing to be stressed.)

The great danger in these cases is that a tenancy created in breach of a mortgagor's covenant may somehow or other become binding on the mortgagee. It does not matter a great deal nowadays what kind of a tenancy it is. In the case under consideration, the unauthorised transaction took the form of a lease for twenty-one years. In deciding that the mortgagees were not entitled to possession as against the assignee of the term created by that lease, Harman, J., did not decide that the tenant was on all the grounds put forward by the tenant entitled to that or any other particular term; it was sufficient to defeat the claim that the tenant was lawfully in possession under a periodical tenancy arising, as between the parties, by the receipt of rent by the receiver. But that is not a material factor in view of the very strong position in which so many tenants have been placed by statute.

Advantage of appointing receiver

The way in which a tenancy which is initially not binding as between the tenant and the mortgagee of the property may most frequently become binding upon the latter is by the receipt by the latter of rent from the tenant. This sometimes happens *per incuriam*, and then nothing can be done to remedy the situation. On the other hand, if the danger is foreseen, rent can be refused while proceedings for possession or some other remedy if appropriate are pending between mortgagee and mortgagor; but the refusal of rent, apart from the immediate hardship which may result to the mortgagee who has by this time probably received no interest for a considerable period, is not advisable except as a last resort. In these circumstances, it may often be advantageous to take advantage of s. 109 (2) of the Law of Property Act, 1925, and to appoint a receiver of the mortgaged property for the express purpose of receiving the rent payable by an unauthorised tenant pending the issue of proceedings for possession or otherwise. The conditions which have to be satisfied before a receiver can be appointed under the statutory power conferred by ss. 101 and 103 of the Act are generally the same as those which have to be satisfied before proceedings for possession (the most useful remedy in these cases) can be brought upon the mortgagor's breach of any of the covenants of the mortgage. The two remedies can therefore be pursued *pari passu*, and on the authority of the present case the mortgagee who takes advantage of the one will not be prejudiced in the other.

Form of prohibition against letting

This is the real utility of this case—as a reminder that s. 109 (2) of the Act means what it says and that arguments that, despite its language, there may be cases in or purposes for which a receiver of mortgaged property appointed under the statutory power is the agent of the mortgagee will not be readily listened to. The question on which the receipt of rents by the receiver became relevant was one of the proper construction of the statute. It did not depend on the form of the prohibition against letting contained in the mortgage, because it could only arise if that prohibition were adequate to extend to the particular letting. But generally it may be said that the form actually used, although it did no harm in

this case, is one not to be recommended. The mortgagor covenanted not to exercise without consent the power of leasing conferred by the statute on a mortgagor. This is the only power which a mortgagor can possess (other, of course, than an expressly created power, which may, however, be dismissed from further consideration on account of its rarity) of creating leases or tenancies which are *ab initio* binding upon the mortgagee as well as upon himself. But apart from statute, a mortgagor has by virtue of his interest in the property the right to create leasehold interests out of his interest which, although not binding upon the mortgagee except by virtue

of the doctrine of estoppel (if applicable in the circumstances), are binding upon himself. It is arguable, I think, that an absolute prohibition against creating any lease or tenancy without consent may have the result that any rights of a tenant under a lease or tenancy created by the mortgagor in despite of such a prohibition, if held to be enforceable against the mortgagee by estoppel arising out of the receipt by the latter of rent from the tenant, may be held to be no greater than those of a periodical tenant whatever the term of the lease or tenancy may be. And that, although a small advantage in many cases, is something one would not wish to throw away.

"A B C"

Landlord and Tenant Notebook

GENUINE, FIRM AND SETTLED INTENTION TO DEMOLISH

Fisher v. Taylors Furnishing Stores, Ltd. [1956] 2 W.L.R. 985 (C.A.); *ante*, p. 316, has provided further useful authority on the proper interpretation of the Landlord and Tenant Act, 1954, s. 30 (1) (f), the enactment which enables a landlord to defeat a business tenant's claim for a new tenancy by showing that "on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises . . . and that he could not reasonably do so without obtaining possession of the holding." The Court of Appeal held that the first requirement was satisfied once the landlord established a genuine, firm and settled intention to demolish or reconstruct; that it did not matter if he had two (or, presumably, more) purposes in view; that considerations of "primary purposes," "real intention," of "main purpose" and "secondary intention," were relevant only in so far as they assisted the court to decide whether the intention to demolish was genuine and was an intention to demolish on the termination of the current tenancy.

The facts were that the respondent landlords purchased the reversion to a lease of an electrical goods shop in September, 1954, the vendor having, in June, given the tenant notice to quit expiring 25th December. The enactment of Pt. II of the Landlord and Tenant Act, 1954, "continued" the tenancy and in June, 1955, the respondents served a notice to terminate at 25th December of that year. They opposed the tenant's application for a new tenancy on the above-mentioned s. 30 (1) (f) ground.

The county court judge found as facts, *inter alia*, that they did intend to demolish the shop and could not do so without obtaining possession; but also that their "object in demolishing" was not to occupy the old building (*sic*), but to rebuild on the site and occupy the new buildings for the purpose of their business as furniture retailers; further that they would not have bought the property (or certain adjoining premises, included in the sale) unless they had had that "ultimate" object in mind. And he held that the case was indistinguishable from *Atkinson v. Bettison* [1955] 1 W.L.R. 1127 (C.A.); 99 SOL. J. 761.

Substantial reconstruction

In *Atkinson v. Bettison* a jeweller who had purchased the reversion to a butcher's shop in 1953 and who proposed to move his business to those premises and to effect a number of alterations ("arcade," the entrance, new floor, new fittings),

etc., unsuccessfully opposed the tenant's application. The decision was the subject of the "Notebook" on 26th November last (99 SOL. J. 809), and perhaps I may be allowed to recall, in view of the importance of the point (to be dealt with later), that the article emphasised that what was found was that the intention was not to demolish a *substantial* part of the premises or to carry out *substantial* work of reconstruction, and what was held was that all that mattered was whether the landlord *intended* to demolish or reconstruct, and not why he might intend to do that.

Intended occupation for own purposes

But it so happened that both in *Atkinson v. Bettison* and in *Fisher v. Taylors Furnishing Stores, Ltd.* the landlords concerned did intend to occupy the holding for the purposes of their own business, and that in each case they were landlords who had bought recently "over the tenant's head" (to use the popular expression adopted by Scott, L.J., in the Rent Act case of *Epps v. Rothnie* [1945] K.B. 562 (C.A.)).

The paragraph which follows para. (f) of subs. (1) of s. 30 of the Landlord and Tenant Act, 1954, and concludes the subsection runs: "subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence." The "hereinafter provided" is to be found in subs. (2): "The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing subsection if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in subs. (1) of s. 23 of this Act."

In each case, then, the "hereinafter" of subs. (2) disqualified the landlord for opposing the application on the ground that he wanted, as he did want, possession for the purposes of his own business. And in driving home the point in *Atkinson v. Bettison*, Denning, L.J., had said: "In the present case that [reconstruction] is not the primary purpose. His primary purpose is to get possession for his own business. He cannot get the premises on that ground because he has not owned them for five years. He should not be allowed

to circumvent the proviso by putting forward a secondary purpose as though it were the main purpose."

It is understandable that the similarities in the facts, and the language used by Denning, L.J., should mislead the county court judge into drawing what was found to be a false analogy. But, as was held, *Atkinson v. Bettison* must be read in relation to its own facts; it was an attempt to circumvent the provisions of the Act.

Whether, not why

It is, perhaps, unfortunate that the word "purposes" was introduced into the discussion in *Atkinson v. Bettison*; for the word occurs in para. (g) but not in para. (f), and purpose is one thing and intention (the important word in para. (f)) another. Admittedly—and the point was duly made in *Fisher v. Taylors Furnishing Stores, Ltd.*, as mentioned in my opening paragraph—consideration of purpose may be relevant to the existence and genuineness of intention; few people who are of age and of sound mind embark on demolition or reconstruction for its own sake. Children have, of course, been known to; Master George Washington was asked whether he had felled the famous cherry-tree, and it is not recorded that his parent followed his question by an inquiry whether compliance with good husbandry, or perhaps a reputation for veracity, was the secondary intention or purpose of the future first president.

When

The decision in *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* [1956] 1 W.L.R. 678; *ante*, p. 435, has stressed another point to be borne in mind when dealing with s. 30 (1) (f); the paragraph insists on intention to demolish, etc., *on the termination* of the current tenancy. Opposition failed in this case because while, as Danckwerts, J., held, the proposed work of adaptation was sufficient to satisfy the *Atkinson v. Bettison* requirement of "substantial," and was such that it could not be carried out unless possession were given, the landlords had not done more than prove that they contemplated, rather than intended, reconstruction of the premises comprised in the holding (the board was not shown to have passed a resolution). There was, therefore, no genuine, firm and settled intention to demolish or reconstruct on the termination of the current tenancy at the vital time, which, the learned judge held, was the date of the service of notice of objection.

The case is reminiscent of *Cunliffe v. Goodman* [1950] 2 K.B. 238 (C.A.) in which it was decided that a landlord's "provisional" intention to pull down or alter did not exempt the tenant from liability for dilapidations (Landlord and Tenant Act, 1927, s. 18 (1)): the prospect of obtaining the then necessary building licences was, at the time, somewhat remote. The relevant subsection does not, however, mention either intention or purpose: it says, "if it is shown that the premises . . . would at or shortly after the termination

of the tenancy have been or be pulled down etc." In *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, Danckwerts, J., expressed his decision by contrasting mere contemplation with decision; some of us may think that an actual decision is more than is required in order to satisfy the provision; and the learned judge himself pointed out that the matter was not within the *sole volition* of any landlord if possession were necessary. One might say that the fact that some officious fielder may obstruct the progress of the ball towards the boundary hardly negatives the existence of the batsman's intention to score four runs.

More recently, another decision reported in *The Times*, *Reohorn v. Barry Corporation* (*The Times*, 8th June) has shown the connection between "whether" and "when." Tenants of land used as a car park were held entitled by the Court of Appeal to a new tenancy though their landlords, the local corporation, meant to "develop" the site by building hotels, shops, etc., upon it—and had passed a resolution to that effect. But they had not the necessary means, and the company and building lessees (intended) who were to carry out the work gave no evidence at the hearing before the county court judge (Denning, L.J., appears to have considered that date, and not the date of objection, to be the vital one). The Court of Appeal held that, while the proposed work was substantial, the landlords could not be found to *intend* what they would be unable to perform. Briefly, one might express the effect of the decision by saying that a firm and settled desire is no substitute for a genuine, firm and settled intention.

Condition of building as evidence

"Intentions can be easily asserted: their genuineness must be established," said Morris, L.J., in the course of his judgment in *Fisher v. Taylors Furnishing Stores, Ltd.* Clearly, no good purpose would be served by trying to make an exhaustive list of the methods by which genuineness can be established. But it is perhaps worth noting that in two reported cases "real evidence" appears to have played some part in supporting the landlord's case. In *Gilmour Caterers, Ltd. v. Governors of St. Bartholomew's Hospital* [1956] 2 W.L.R. 419 (C.A.); *ante*, p. 110, the issue was not, in fact, genuineness; but Denning, L.J., observed in his judgment: "The condition of the premises is so bad that they ought obviously to be demolished and reconstructed in the very near future." And in *Fisher v. Taylors Furnishing Stores, Ltd.*, the same lord justice remarked: "The premises are about 250 years old and are very near the end of their useful life. They have no historic interest, and in any case they ought to be demolished in about five years' time."

These *dicta* are, I suggest, of significance for any purchaser who contemplates or intends to avail himself of the Landlord and Tenant Act, 1954, s. 30 (1) (f). He should look round for some dilapidated property unlikely to be scheduled as an ancient monument.

R. B.

SOCIETIES

The Lord Mayor and the Lady Mayoress and the sheriffs and their ladies attended a dinner of the CITY OF LONDON SOLICITORS' COMPANY in Guildhall on 28th May, at which the Master, Alderman Sir Cullum Welch, presided. Others present included: The Lord Chancellor and Viscountess Kilmaur, the High Commissioner for India, the High Commissioner for New Zealand and

Lady Webb, the Swiss Minister and Mme. Daeniker, the Bishop of London and Miss Montgomery Campbell, Lord and Lady Evershed, Sir Hartley Shawcross, Q.C., M.P., and Lady Shawcross, Mr. C. F. and Lady Hermione Cobbold, Mr. and Mrs. Charles Norton, Alderman Sir George and Lady Wilkinson, Alderman Sir Frank Newson-Smith and Mr. and Mrs. C. F. Glenny.

HERE AND THERE

HOUSE AND COMMITTEE

In the old days until the end of the war most lawyers had a pretty clear idea how the judicial business of the House of Lords was carried on. The Law Lords sat in the Chamber itself with a break in the middle of the week while the politically-minded peers came into occupation to transact political business. The Lord Chancellor usually presided. This went on all through the perils of war even when the Lords had retired to a temporary Chamber fitted up in the King's Robing Room, resigning their proper Chamber to the displaced Commons, bombed out of their own. It was in the temporary Chamber that the Law Lords were overtaken by a new order which, though it was conceived about ten years ago, still has a certain atmosphere of the provisional about it, so that its theory and practice have never quite penetrated the consciousness of the profession. It all started with the excavations for the new boiler house at the south end of the Houses of Parliament, just under the windows of the King's Robing Room. Some groups cannot maintain peaceful coexistence. They include counsel presenting legal arguments and pile drivers driving piles. It was decided that the pile-driving must go on night and day. What was to happen to the appeals? The flexible, adaptable old British constitution found a way of coping with them. The hearing of the arguments should be delegated to a committee of Law Lords. The committee would report to the House represented by the same Law Lords who had heard the arguments. On the consideration of the report in the Chamber their speeches would be delivered and the decision voted on. Not everybody liked the innovation, but dissentients were placated by assurances that it was a purely temporary expedient. The late Lord Simon disapproved so deeply of its constitutional implications that thereafter he took scarcely any part in judicial business.

SETTLING IN

So the argument of appeals was relegated to the committee room at the far end of the long committee corridor, the region where the Parliamentary Bar argues out the pros and cons of Private Bills. This was a step down in dignity even from the setting of the temporary Chamber which, after all, had its throne and its rows of upholstered benches and its enormous wall paintings. True, the committee room was lofty and had an interesting prospect of the Thames with its tugs and its barges and its steamers below the two tall windows, but the appointments were extremely simple and the sole decoration was a very large portrait of Lord Chancellor Eldon glowering from one wall. All the same, there was one outstanding convenience about the new arrangement, uninterrupted sittings from Monday to Thursday, with no mid-week break, and a long week-end from Friday to Sunday. Since the sittings overlapped the political business in the House, the Lord Chancellor was almost entirely cut off from the hearing of appeals. That was one of Lord Simon's objections. But the

habit grew and, even after the Lords were restored to the enhanced magnificence of their own Chamber with a lot more spacious accommodation than formerly for counsel at the Bar of the House, it was only occasionally that a case or two went there for argument. By contrast, however, the committee room looked more naked than ever, so Lord Eldon was banished to a corridor and two enormous tapestries, displaced from some stately home, were hung on the walls. Above the heads of counsel was Alexander visiting the camp of the conquered Darius. Above the heads of the Law Lords was an allegorical group of lovely females clustering round an armoured warrior worshipping Cupid. Their relevance intrigued the thoughtful and the curious and their contemplation lightened a dull argument. More recently they have been replaced by three more tapestries, two large ones on the long walls and a smaller one between the windows, representing rural life in the elegant eighteenth-century manner, pastoral scenes and a group of half-a-dozen young ladies and one young man dallying amorously over the release of caged birds, against a background of classical ruins. They belong to the right period to harmonise with the wigs of counsel, but otherwise their charm is somewhat inconsequent. The latest additions to the committee's dignity are two sets of brocaded curtains for the great windows. Soon nothing will remain to improve but the ventilation. Last winter the over-heating in all parts of the Houses of Parliament was at its most suffocatingly soporific here.

CLOUD OF WITNESSES

THE remoteness of the committee room, far away from the main thoroughfares of the Houses of Parliament, mostly keeps it free from casual visitors. Parties conducted by Members of Parliament do not penetrate that far. But this week the space behind and around counsel has been as full as it could hold. The case being heard has a religious significance and, although the British do not in everyday life present the appearance of a deeply mystical people, this is the sort of occasion when one sees something of what the appearances hide. The appeal, which is from the Court of Session in Scotland, relates to the liability to military service of certain officers of Jehovah's Witnesses and the question briefly is whether they come within the definition of "a regular minister of any religious denomination." This occasion has brought into the committee room a veritable cloud of witnesses, hemming in the lawyers so closely that one has been able to get in and out only with the greatest difficulty. All have been listening with rapt attention alike to the legal arguments and to their leading counsel's exposition of their theocratic organisation and their anticipation of the Second Coming and the eternal rule of the Anointed. One had the feeling that to them it was a possibility by no means remote that court and counsel and solicitors would experience a mass conversion, so earnest was their expression.

RICHARD ROE.

Mr. EWART KENNETH MARTELL, solicitor, of Bedford, has been appointed vice-chairman of the Bedfordshire County Council.

Mr. A. P. D. SUTCLIFFE, solicitor, of Wakefield, has been appointed assistant solicitor to Huddersfield Corporation in succession to Mr. B. SLATER, who has been appointed to a similar post with Birmingham Corporation.

Mr. R. P. TUNSTALL, Kent county prosecuting solicitor, has been appointed clerk to the Luton magistrates.

Mr. Norris Maltby Brown, solicitor, of York, left £28,225.

Mr. Frederick Stockton Gowland, solicitor, of Sharow, near Ripon, left £41,844.

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Court of Appeal

BANKRUPTCY: FRAUDULENT PREFERENCE: INFERENCES TO BE DRAWN FROM FACTS

In re Cutts (A Bankrupt); ex parte Bognor Mutual Building Society v. Trustee of T. W. Cutts

Lord Evershed, M.R., Jenkins and Hodson, L.JJ.

17th May, 1956

Appeal from the Divisional Court.

The bankrupt was a solicitor having as one of his most important clients a building society. He was also a director of that society. Early in 1953, a mortgage to the society was discharged and, unknown to the society, the bankrupt applied the mortgage moneys amounting to £3,303 for his own purposes. This was not the bankrupt's only defalcation. He had misapplied considerable sums of his clients' money. In November, 1953, the fact that the sum of £3,303 had been misappropriated came to the knowledge of one Wintle, who was a solicitor employed by the bankrupt in his office, and also a director of the building society. Wintle raised the question of the £3,303 with the bankrupt in November, 1953; he did not, however, inform the society of the defalcation. In December, 1953, The Law Society inspected the bankrupt's books, which showed serious deficiencies in clients' accounts, but The Law Society did not discover that the bankrupt had defrauded the building society of the sum of £3,303. On 12th March, 1954, the bankrupt paid the sum of £3,303 to the society. The bankrupt's name was struck off the roll of solicitors on 24th June, 1954, and he was adjudicated bankrupt on 6th September, 1954. His trustee in bankruptcy applied for a declaration that the payment of £3,303 was made by the bankrupt with intent to prefer the society at a time when he was unable to pay his debts and was void against the trustee. The county court judge held that the payment was a fraudulent preference under s. 44 of the Bankruptcy Act, 1914, and ordered the society to repay that sum to the trustee. The county court judge held that Wintle had not put pressure on the bankrupt to make the payment and that the society had not done so being at all material times ignorant of the defalcation. The payment had been made at Wintle's request to try to retain the society as a client for the firm and also so as not to jeopardise Wintle's position as a director of the society. The Divisional Court affirmed the decision of the county court judge. The building society appealed. *Cur. adv. vult.*

LORD EVERSLED, M.R., said that the question resolved itself into this: was the debtor from October, 1953, acting throughout under some form of pressure or intimidation from Wintle so that his dominant object was to relieve that pressure and so that, in effect, the debtor's intention in making the payment, when it was made, was in truth the intention, not of the debtor but of Wintle? Or did the debtor, acting no doubt to some extent in collaboration with Wintle and, it might be also, in some degree under Wintle's influence, yet in substance voluntarily and deliberately make the payment in order to prefer and with the intention of preferring the society (that was of making to them preferential payment subject to which his other creditors would have to rank for such payment as they might get) and because by so preferring the society he would give an advantage to Wintle and perhaps even to some extent thereby to himself? In his (his lordship's) judgment, the judge who heard the witness interpreted the transaction in the latter sense; and he (his lordship) thought on the whole, as the judges in the Divisional Court thought, that the county court judge was entitled so to do. Furthermore, he (his lordship) thought with the Divisional Court judges that the result was a fraudulent preference within the meaning of s. 44 of the Bankruptcy Act, 1914. The essential thing, as he construed the finding, was, for the debtor, that the society should be paid and paid in priority and preference to anyone else. Even if the debtor thought still that he might survive, the situation was desperate enough. He knew (as the judge found) that he was insolvent. He knew that the irregularities on his clients' accounts had been discovered and that proceedings had been initiated to have him struck off the roll of

solicitors. If he had any hope of survival, it was with Wintle only that he could survive. If he did not survive, then Wintle was the man to help and the way to help Wintle was by preferring one particular creditor—the firm's best client of which Wintle was a director, and in the payment to whom Wintle was seriously implicated and interested. *In re Kushler* [1943] Ch. 248 seemed to him (his lordship) to support the view that an intention to prefer a particular creditor was not negated by the circumstance that the preference was the means of making provision also for a third party who was not himself a creditor and not, therefore, capable himself of being the subject of a preference. The appeal should be dismissed.

JENKINS, L.J., dissenting, said that the Divisional Court attached great importance to the county court judge's implied finding that there was no pressure by Wintle, and adduced from that implied finding the conclusion that this must be treated as a voluntary payment. It was, of course, true that a payment could not constitute a fraudulent preference unless it was voluntary, but it did not follow that every voluntary payment which had the effect of giving the creditor paid a preference over the other creditors was a fraudulent preference. The question still remained what was the view or intent. He (his lordship) was not satisfied that this was for the present purpose a voluntary payment. He would allow the appeal.

HODSON, L.J., delivered a judgment dismissing the appeal. Appeal dismissed.

APPEARANCES: *W. A. L. Raeburn, Q.C., and Morris Finer (Denis Hayes); Muir Hunter (Tarry, Sherlock & King).*

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [1 W.L.R. 728]

INCOME TAX: "EXPENSES OF MANAGEMENT": LIFE ASSURANCE COMPANIES: BROKERAGE AND STAMP DUTIES ON PURCHASE AND SALE OF SECURITIES

Sun Life Assurance Society v. Davidson Phoenix Assurance Co., Ltd. v. Logan

Singleton, Morris and Romer, L.JJ. 17th May, 1956

Appeals from Harman, J. ([1956] 2 W.L.R. 77; *ante*, p. 34).

Under s. 33 (1) of the Income Tax Act, 1918, two life assurance companies claimed repayment of so much of the income tax paid by them for the year of assessment 1949-50 as was equal to the amount of tax on the sums disbursed as expenses of management for the year ended 31st December, 1949. The claim was objected to by the Crown on the ground that, included in the expenses of management claimed, there were sums which the companies disbursed by way of brokerage and stamp duties, and it accordingly fell to be heard and determined in like manner as in the case of an appeal against assessment. The sole question raised was whether sums paid or suffered in the year ended 31st December, 1949, in respect of brokerage or stamp duties by the Sun Life Assurance Society, Ltd., amounting to £40,773, and by Phoenix Assurance Co., Ltd., amounting to £62,806—which, less consequential reduction of foreign life fund restriction, was £59,183—were "expenses of management" within s. 33 (1).

SINGLETON, L.J., said that if there had not been any authority on this question he would have said that the expenses here in question were expenses of management, but he found himself faced with two difficulties. The first was that which faced Harman, J.—the decision in *Capital and National Trust, Ltd. v. Golder* (1949), 31 Tax Cas. 265, and the second was that the Solicitor-General on behalf of the Crown did not submit any argument on whether that case was rightly decided or not, but rested his submission on the decision which, he submitted, was conclusive of the appeal so far as the Court of Appeal was concerned. In those circumstances, it would not be right of that court, in the absence of argument on one side, to express any opinion upon the decision. They were bound by it if it covered this appeal. Harman, J., was unable to distinguish this case from *Golder's* case. It was said, on behalf of the society, that the decision in *Golder's* case was not conclusive on this

appeal. It was pointed out that the society was a trading concern and carried on different branches of business, and that its investment business was related to its circulating capital, whereas in *Golder's* case the purchases and change of stocks were in relation to the capital of the company. In a case such as *Golder's* case the cost of changing from one form of security to another—be it from real property to stocks and shares, or from one stock to another—might well be a charge against capital, and not an expense of management even though the management of the company had devoted time to the consideration of it. This, however, was not the basis of the judgment in *Golder's* case. He (his lordship) felt that it was the duty of the court to say that upon the authority of the decision of the court in that case the appeal should be dismissed.

MORRIS and ROMER, L.J.J., gave concurring judgments. Appeals dismissed. Leave to appeal.

APPEARANCES: *Sir James Millard Tucker, Q.C., L. C. Graham-Dixon, Q.C., and John L. Creese (Hair & Co.)*; *F. Heyworth Talbot, Q.C., and F. M. Young (Slaughter & May)*; *Sir Harry Hylton-Foster, Q.C., S.-G., Roy Borneman, Q.C., and Sir Reginald Hills (Solicitor of Inland Revenue)*.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [3 W.L.R. 238]

LICENSOR AND LICENSEE: KNOWLEDGE OF DANGER: DUTY TO INVITEE AND LICENSEE NO LONGER DISTINGUISHABLE

Slater v. Clay Cross Co., Ltd.

Denning, Birkett and Parker, L.J.J. 17th May, 1956

Appeal from Ashworth, J.

The plaintiff, while walking along a narrow tunnel on a railway track over land owned and occupied by the defendant company, was struck and injured by a train driven by the company's servant. In an action for negligence against the company the trial judge held that she was a licensee on the land and the track, and that the driver had been negligent in failing to observe instructions to whistle and to slow down when entering the tunnel, which the company knew was used by members of the public. He gave judgment for the plaintiff, though finding her contributorily negligent. The company appealed.

DENNING, L.J., said that the fact that the plaintiff was a licensee was no longer of special significance. The abolition of the distinction between invitee and licensee, recently recommended by the Law Reform Committee, had already been virtually attained by the decisions of the court, which showed that a licensor as well as an invitor was now liable for unusual dangers of which he knew or ought to have known. In the present case the company, in carrying on their operations, were under a duty to take reasonable care not to injure anybody lawfully walking on the railway, and they had failed in that duty by exposing the plaintiff to a risk of which they were well aware. Nor was the maxim *volenti non fit injuria* applicable to bar the plaintiff's cause of action. When this lady walked into the tunnel, though it might be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, she did not take the risk of negligence by the driver. Her knowledge of the danger was a factor in contributory negligence, but it was not a bar to the action. Knowledge of the danger was only a bar where the party injured was free to act on it, so that his injury could be said to be due solely to his own fault. The appeal should be dismissed.

BIRKETT and PARKER, L.J.J., concurred. Appeal dismissed.

APPEARANCES: *R. E. A. Elwes, Q.C., and Bernard Caulfield (J. F. Coules & Co.)*; *H. G. Talbot (Sharpe, Pritchard & Co., for Bertram Mather & Co., Chesterfield)*.

[Reported by Miss M. M. HILL, Barrister-at-Law] [3 W.L.R. 232]

Chancery Division

PRACTICE: APPEAL: NO POWER TO ABRIDGE TIME

In re No. 20 Exchange Street, Manchester Austin Reed, Ltd. v. Royal Insurance Co., Ltd.

Danckwerts, J. 8th May, 1956

Adjourned summons.

The Royal Insurance Co., Ltd., demised premises to Austin Reed, Ltd., for a term of three years as from 1st January, 1952.

In 1955 the landlord served on the tenant a notice pursuant to s. 25 of the Landlord and Tenant Act, 1954, terminating the tenancy on 14th April, 1956, which stated that the landlord would oppose an application for a new tenancy under s. 30 (1) (f) of the Act. On 15th November, 1955, the tenant, pursuant to the provisions of the Act, served a notice on the landlord stating that it was not willing to give up possession of the premises on the date specified in the landlord's notice. On 3rd February, 1956, the tenant took out a summons applying for the grant of a new tenancy under Pt. II of the Act. Danckwerts, J., refused the application and counsel for the landlord applied for an order abridging the time within which the tenant was allowed to appeal from six weeks to one week. It was contended for the landlord that, notwithstanding that the time for appeal in the new order, R.S.C., Ord. 58, r. 4 (1) (c), was six weeks, the court still had a general power under R.S.C., Ord. 64, r. 7, to abridge that time. The tenant contended that there was a difference between the old Ord. 58, r. 15, and the new Ord. 58, r. 4, which was not subject to the general powers contained in Ord. 64, r. 7, except in so far as the Court of Appeal might enlarge the time.

DANCKWERTS, J., said that it appeared to him that under the new Rules of the Supreme Court in regard to appeals he had not any power to abridge the time for an appeal. If he had any such power under R.S.C., Ord. 64, r. 7, he doubted whether he could exercise it in a case of this kind. The possible hardships to which counsel for the landlord had referred were hardships created by the Landlord and Tenant Act, 1954, and by matters with which he ought not to interfere, since the Legislature had thought fit to provide for certain consequences in cases of this kind. Application refused.

APPEARANCES: *Charles Russell, Q.C., and Michael Browne (Linklaters & Paines, for Laces & Co., Manchester)*; *Roy Wilson, Q.C., and Adrian Hamilton (Underwood & Co.)*.

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 765]

INCOME TAX: CHARITY: NON-PROFIT-MAKING THEATRICAL COMPANY

Associated Artists, Ltd. v. Inland Revenue Commissioners

Upjohn, J. 8th May, 1956

Appeal from the Special Commissioners for the purposes of the Income Tax Acts.

The appellant company, Associated Artists, Ltd., a non-profit-making theatrical association, claimed exemption from income tax under s. 448 (1) (c) of the Income Tax Act, 1952, in respect of certain profits on the ground that it was a body established for exclusively charitable purposes. The Special Commissioners disallowed the claim and found that the association, on the proper interpretation of its objects, was not such a body. The appellant company was incorporated in 1946 as a company limited by guarantee. The idea of forming such a company had been conceived by Mr. John Clements who, whilst playing in the commercial theatre, considered that there was a need for a non-profit-making organisation with a policy of putting on plays of the highest standard, both in London and in the provinces, with a bias towards classical plays. The company produced a number of plays, but all of them with the exception of "The Beaux Stratagem" (which resulted in a profit of £26,000) had made a loss. The company had been granted exemption from entertainments tax. The following objects were included in cl. 3 of its memorandum of association: "(a) To present classical, artistic, cultural and educational dramatic works . . . (b) To foster, promote and increase the interest of the public in the dramatic art and in the correlated arts . . . (c) To encourage and promote the creation of, and to arrange for the presentation of new dramatic works and . . . of affording advanced students facilities for training . . . (j) To establish, subsidise, promote, co-operate or federate with or become affiliated to, or lend money or other assistance to any association . . . whose objects are altogether similar to the objects of this association . . . (l) To do all such other things as are incidental or which the association may think conducive to the attainment of any of the above objects."

UPJOHN, J., said that the first matter to be considered was whether this phrase "to present classical, artistic, cultural and educational dramatic works" was to be read conjunctively so that the dramatic works all had to be classical and artistic and

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cultural and educational, or whether it could be read disjunctively. It was in every case a question of pure construction, and he thought that on the whole the only way to read the words of sub-cl. (a) was disjunctively. It had been submitted that presenting an artistic dramatic work was so wide and vague a phrase that one could put on almost any type of play. This memorandum did not in terms state that the object was to promote artistic taste, it was to present artistic plays; and he found it difficult to attach any real charitable concept to an artistic dramatic work; it was too wide and too vague and, therefore, was not charitable. The matter did not end there. Counsel had attacked sub-cl. (b), and said that the words of it were of themselves too vague. He (his lordship) did not agree with that. It seemed to him an excellent way of increasing the artistic taste of the public in the way Lord Greene mentioned in *Royal Choral Society v. Inland Revenue Commissioners* (1943), 25 Tax Cas. 263. With regard to sub-cl. (c), that seemed to him, taken by itself, to be covered by the *Shakespeare Memorial Trust* case [1923] 2 Ch. 398. The next attack was made upon sub-cl. (j). He thought that if one found *aliunde* that the company was incorporated for a charitable purpose, it seemed to him that the objects of any other body which were to be altogether similar must themselves be charitable. Finally, the attack was made upon sub-cl. (l). On this matter he had the assistance of authority in *Oxford Group v. Inland Revenue Commissioners* [1949] 2 All E.R. 537. On the authority of that case he must hold that the powers in sub-cl. (l) were independent of, and not ancillary to, the other objects, and that that clause was of itself sufficient to render the objects of the association non-charitable, since the court in deciding whether any activity of the association was *ultra vires* would have to decide whether the association thought that it was "conducive to the attainments" of the association, and what the association might think conducive would not necessarily be so. The association was not, therefore, a body established exclusively for charitable purposes, and the appeal should be dismissed. Appeal dismissed.

APPEARANCES: G. G. Honeyman, Q.C., and David Wilson (Campbell, Hooper & Todd and Fournier & Roberts); Sir Lynn Ungood-Thomas, Q.C., Sir Reginald Hills and E. Blanshard Stamp (Solicitor of Inland Revenue).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 752]

COMPANY: SALE OF ASSET BY DIRECTORS AT ALLEGED UNDERVALUE: ACTION BY MINORITY SHAREHOLDER

Pavlidis v. Jensen and Others

Danckwerts, J. 14th May, 1956

Adjourned summons.

The plaintiff, Sir Paul George Pavlidis, as a minority shareholder of the Tunnel Asbestos Cement Co., Ltd. (the company), sought to bring an action on behalf of himself and all other shareholders, save three who were directors of the company, against those directors and the company for damages for negligence in that the directors were guilty of gross negligence in effecting a sale of a valuable asset of the company, an asbestos mine in Cyprus, at a price (it was alleged) greatly below its true market value. The company was controlled by another company, Tunnel Portland Cement Co., Ltd., the majority voting power of which was controlled by the same directors. The allegations of misfeasance were denied by the defendants, who applied under R.S.C., Ord. 25, r. 2, for the determination before the trial of the action of the question whether on the facts alleged by the plaintiff the action was maintainable. *Cur. adv. vult.*

DANCKWERTS, J., said that he had to deal with the application on the footing that the allegations in the statement of claim were true. It was agreed that he ought not to allow himself to be affected either by the smallness of the plaintiff's apparent stake in the fortunes of the company or by any scepticism that he might feel as to the alleged magnitude of the defendants' delinquency. It was contended on behalf of the defendants that the matters in respect of which the plaintiff complained, and in particular the question whether proceedings should be taken against the directors, was a matter of internal management of the company with which, on the principle stated in *Foss v. Harbottle* (1843), 2 Hare 461, the court normally would not interfere. It was contended further on behalf of the defendants that the present case—based on negligence of directors—was not

within the few recognised exceptions to the above-mentioned rule, namely, cases of *ultra vires*, illegality, or fraud (including fraudulent oppression of a minority by the majority of the shareholders). Further, it was said, the case was not a case where the control of the voting power was in the hands of the directors of the company whose actions were impugned, for they were not the shareholders; the shares were held by another company of which the defendant directors merely happened also to be among the directors. For the plaintiff it was contended that the above-mentioned exceptions were not exhaustive, and the court would grant relief wherever justice required on any ground, and particularly where an otherwise helpless minority shareholder was in need of assistance by the court: see Buckley on the Companies Acts, 12th ed., pp. 168-169, and *per* Sir George Jessel, M.R., in *Russell v. Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474, 480, 482. As regards control, it was contended that, except for an immaterial period, the defendant directors, being a majority of the directors of the Tunnel Portland Cement Co., Ltd. (the holder of the vast bulk of the shares of the company), were in a position to stifle any attempt to institute proceedings in the name of the company against them. He (his lordship) observed that the wide expressions used in Buckley and by Sir George Jessel, M.R., in the above-mentioned case were not supported by the statement of the law by Lord Davey in the Privy Council case of *Burland v. Earle* [1902] A.C. 83, 93. On the facts of the present case, the sale of the company's mine was not beyond the powers of the company, and it was not alleged to be *ultra vires*. There was no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority. It was open to the company, on the resolution of a majority of the shareholders, to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of the majority to decide that, if the directors by their negligence or error of judgment had sold the company's mine at an under-value, proceedings should not be taken by the company against the directors. Applying, therefore, the principles as stated by Lord Davey, it was impossible to see how the present action could be maintained. He (his lordship) had examined again all of the large number of authorities which had been cited in the course of the arguments; he did not think that any of them justified any conclusion other than that which he had reached. He would dismiss the action under R.S.C., Ord. 25, r. 3.

APPEARANCES: Charles Russell, Q.C., and Kenneth Mackinnon (E. F. Turner & Sons); Raymond Walton (Stibbard, Gibson & Co.).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.] [3 W.L.R. 224]

WILL: ADMINISTRATION: MURDER OF TESTATRIX BY SOLE BENEFICIARY

In re Callaway; Callaway v. Treasury Solicitor

Vaisey, J. 16th May, 1956

Adjourned summons.

A testatrix, by her will, appointed her daughter sole executrix and gave the whole of her estate to her absolutely. The only children of the testatrix were her daughter and one son. The daughter having murdered her mother and committed suicide, a summons was taken out by the son for a declaration that, on the true construction of the Administration of Estates Act, 1925, and in the events which had happened, the plaintiff was beneficially entitled to the estate of the testatrix to the exclusion of any interest of the Crown therein as *bona vacantia*.

VAISEY, J., said that under the rule based on public policy the daughter was undoubtedly precluded from taking any benefit under her mother's will, and on that assumption the son had applied for and been granted letters of administration to his mother's estate. This rule, based on public policy, was that no person was allowed to take any benefit arising out of a death brought about by the agency of that person acting feloniously, whether it be a case of murder or of manslaughter. There appeared, however, to be no satisfactory or complete authority as to the consequences arising from an application of that rule. The best exposition of the problem was in an Australian case, *In re Jane Tucker, deceased* (1921), 21 S.R. (N.S.W.) 175. So far as could be found there was little trace of this doctrine in English law until it arose in *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147. He inferred from that authority that the rule in this country was that the interest of

the criminal passed as if there had been a "lapse"; in other cases it had been said that the name of the wrongdoer had to be treated as "struck out." The Treasury Solicitor had contended that the rule, properly understood, did no more than exclude the culprit, and, while it might accelerate subsequent existing interests, it could not create any new interests, with the consequence that the forfeited interest was one to which nobody was entitled and therefore went to the Crown as *bona vacantia*. The son and the daughter being the persons entitled equally under an intestacy, and the daughter being disentitled by the rule, he had to choose between two views, first, that the son was alone qualified to take under the intestacy and accordingly entitled to the whole estate, or that the daughter's half was forfeited and went to the Crown. In the present state of the authorities, which was far from satisfactory, he felt bound to adopt the former view. He did not consider the metaphorical expression "struck out" as being particularly happy or helpful, but it was difficult to suggest a more appropriate expression. In the absence of authority he would have desired to deal with it differently. That the son should take the whole seemed to him illogical and unmeritorious; for why should he be the person to benefit by his sister's crime and consequent frustration of his mother's testamentary intentions? However he would declare that on the true construction of the Act and in the events which had happened the son was beneficially entitled to the estate to the exclusion of any beneficial interest of the Crown therein. Declaration accordingly.

APPEARANCES: J. L. Arnold (*Rider, Heaton, Meredith & Mills*, for Sibley, Clough & Gibb, Bristol); Denys Buckley (*Treasury Solicitor*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [3 W.L.R. 257]

Probate, Divorce and Admiralty Division

PROBATE: COMPROMISE OF ACTION: REFUSAL BY PARTY CITED TO SIGN: RIGHTS OR CLAIMS SPECIFICALLY WAIVED: R.S.C., Ord. 16, r. 9a

In the Estate of Tame, deceased; Tyler v. Sweetlove; Tame and Tame

Karminski, J. 2nd May, 1956

Short cause

The plaintiff was the executor and sole beneficiary named in a will alleged to be the true last will of the deceased and dated 12th May, 1953. The deceased died on 5th May, 1954, but the will itself could not be found. The plaintiff asked the court to pronounce for the will and decree probate of the contents as contained in a completed copy. The defendants, who were among those entitled to the estate in the event of an intestacy, relied on the presumption of law that the alleged will had been destroyed *animo revocandi*. All those other than the defendants who were interested in the event of an intestacy were cited to see the proceedings, and duly served; but none of them entered an appearance. Terms of compromise were agreed between the parties under which, *inter alia*, the will of 12th May, 1953, as contained in the completed copy, was pronounced for. The defendants and all parties cited to see the proceedings, with the exception of one C.W.T., signed the terms of compromise on 18th March, 1956. C.W.T., who had been informed of the terms and asked for his consent, wrote to the plaintiff's solicitors and said that his time also was important, observing that he had previously refrained from writing to them or taking any part in "this affair." He continued: "Also, sir, it is my wish not to have any part in this unhappy affair. Do please note. I waive any rights or claims I may have had to this estate of Mr. James Tame. Please remove my name from all documents relating to the estate. I do not want any further communication in regard to this matter." He was informed in reply that the contents of his letter had been noted and that the case would be heard in London as a short cause on 2nd May, 1956. The terms of compromise made no provision that the terms be filed and made a rule of court; and the plaintiff received no request for the inclusion of that provision from the defendants or the parties cited. At the hearing the court was prepared upon the evidence to pronounce for the will of 12th May, 1953, as contained in the completed copy. But the question arose whether C.W.T. would be bound by the terms of compromise, since he had not signed them.

KARMINSKI, J., said that it had been submitted that an order could be made, under R.S.C., Ord. 16, r. 9A, that the compromise entered into between the parties should be binding on C.W.T. The application had the merit of being novel, but he (his lordship) had been persuaded that it was a proper case for such an order, having regard to the particular circumstances and, in particular, to the terms of the letter of 18th March, 1956. The terms of compromise were not expressed that the court should be asked to file them and to make them a rule of court, but he had the power to do so. [His Lordship referred to a direction of Lord Merrivale, P., in *Tristram and Coote's Probate Practice*, 20th ed., at p. 548.] Of those who had signed the terms of compromise some had had the benefit of advice, but some had not. When the terms did not provide that the compromise should be filed and made a rule of court, discretion should be rather sparingly exercised, although quite often a reference to that matter was left out *per incuriam*; and he would not direct that the terms here be filed and made a rule of court. Order accordingly.

APPEARANCES: A. T. Hoolahan (*G. Houghton & Son*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law.] [1 W.L.R. 762]

HUSBAND AND WIFE: CONDUCT CONDUCTING: CONSTRUCTIVE DESERTION AND NO MORE

Jenkins v. Jenkins

Lord Merriman, P., and Davies, J. 3rd May, 1956

Appeal by a husband from an order of the justices for the Romford petty sessional division of 20th February, 1956, made on the ground of his adultery.

The parties were married in 1932. On 1st January, 1952, the wife had turned the husband out of the house in circumstances which were held in these proceedings to amount to constructive desertion. At the hearing the husband admitted that he had been committing adultery with a named woman, whom he had met in or about August, 1952, since March, 1953; but he based his defence upon s. 11 (3) of the Matrimonial Causes Act, 1937, on the ground that the wife by her wilful neglect or misconduct had conducted to his adultery. In rejecting this defence, the justices in their reasons, after finding the desertion established, pointed out that the husband's acquaintance with the woman had not begun until some time after the wife's desertion, and adultery had not commenced until about fourteen months after the commencement of the desertion, and said: "The bench have found desertion proved against the wife but nothing more, and applying the test set out in *Richards v. Richards* [1952] P. 307 the bench find that the husband's adultery was not conducted to by the wife's conduct." They further found that the wife had no ground to suspect that he would commit adultery if she deserted him.

LORD MERRIMAN, P., asked Davies, J., to give the first judgment.

DAVIES, J., referred to the observation in *Brown v. Brown* [1956] 2 W.L.R. 1000, at p. 1003, that in a court of summary jurisdiction misconduct conducting was an absolute bar, and the onus lay on the wife to show that she had not conducted to the adultery, and said that in the present case the justices had expressly found that although the wife had constructively deserted the husband, there were at that time no circumstances that would lead anyone reasonably to believe that the likely consequence would be that he would commit adultery. It had been contended on behalf of the husband that *Richards v. Richards, supra*, was a case of simple desertion, and reliance had been placed on the observation in *Brown v. Brown, supra*, at p. 1007, that Denning, L.J., in *Richards v. Richards, supra*, had, when using the phrase "desertion and nothing more," meant to exclude cases of constructive desertion, for it is easy to imagine expulsive words or other expulsive conduct which might very well be held to conduce to adultery, and that the justices had therefore misdirected themselves, since this was a case of constructive desertion. In his (his lordship's) opinion, the two expressions of opinion were harmonious. Taken on its full context, the passage in *Richards v. Richards, supra*, at p. 310, did not and could not mean that in no case of simple desertion could the circumstances of the desertion ever amount to misconduct conducting. Denning, L.J., had said, for example, that the wife in that case had not been left destitute, and it seemed clear from that passage that he was contemplating cases of simple desertion where the conduct of the deserting party could well be said to conduce to adultery on the part of the deserted spouse, as, for example,

where the wife had been left with no money and a family to bring up, and had then formed an adulterous liaison. On the other hand, *Brown v. Brown*, *supra*, in which it had been held that the wife's misconduct could not as a matter of law amount to misconduct conducting, was not an authority for the proposition that all constructive desertion ought to be taken as amounting to misconduct conducting. The justices in the present case had found constructive desertion by mere expulsion and nothing more. When one had a case of constructive desertion and nothing more that did not amount to misconduct conducting, just as in the case of simple desertion and nothing more. But if there were facts connected either with the circumstances of simple desertion, or with the circumstances of constructive desertion, which were such as to result in causing the deserted spouse to commit adultery, then that was or might be misconduct conducting. But it was impossible on the facts here to find that the adultery, begun long after the desertion, had been conducted to by the expulsion. His lordship added that it might well be that the longer the time that had expired since the original act of desertion the less likely it would be that the court would come to the conclusion that the act of desertion had conducted to adultery starting years afterwards.

LORD MERRIMAN, P., concurred. Appeal dismissed.

APPEARANCES: *D. Vowden (Pinney, Mummery & Co.)*; *R. L. Bayne-Powell (Daybell's)*.

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] [3 W.L.R. 262]

Court of Criminal Appeal

CRIMINAL LAW: EVIDENCE OF CHILD: CORROBORATION BY ANOTHER CHILD

R. v. Campbell

Lord Goddard, C.J., Cassels and Donovan, JJ.
30th April, 1956

Appeal against conviction.

A schoolteacher was convicted on an indictment containing seven counts, each alleging an indecent assault on one of seven different boys. In some counts corroborative evidence was given by boy complainants referred to in other counts, and in four counts there was corroborative evidence given by children not involved in any of the charges. All the children gave evidence on oath.

LORD GODDARD, C.J., said that the main point taken was that as courts had always warned juries of the danger of convicting on the uncorroborated evidence of a child of tender years, the evidence of such a child could not amount to corroboration unless his evidence was also corroborated by an adult; that meant that there could be no point in calling a child to corroborate. By s. 38 of the Children and Young Persons Act, 1933, a child of tender years might give sworn evidence, but there could be no conviction unless that evidence was corroborated by other material supporting evidence. There was no reason why the corroboration should not be the evidence of another child capable of being sworn. Why, then, should not the sworn evidence of a child, not required by statute to be corroborated, not be corroborated by the evidence of another child? The courts always warned juries regarding convicting on the uncorroborated evidence of a child, but the same warning was given in the case of adults in sexual cases. In the case of children, the jury should be warned that not only the evidence of the main witness but that of the corroborating witness should be looked at with care; but there was no doubt that the jury could accept such evidence as corroboration, and it made no difference to admissibility that the corroborating witness was alleged in the indictment to be an assaulted person on another count. To sum up, unsworn evidence of a child must be corroborated by sworn evidence. Sworn evidence of a child need not as a matter of law be corroborated, but the jury should be warned that there was a risk in acting on it if uncorroborated. The unsworn evidence of a child could amount to corroboration of sworn evidence, though a particularly careful warning should be given. As such a warning had been given in the present case, the appeal should be dismissed. Appeal dismissed.

APPEARANCES: *M. Havers (Registrar, Court of Criminal Appeal)*; *F. H. Lawton (Director of Public Prosecutions)*.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 219]

Central Criminal Court

CRIMINAL LAW: CONSPIRACY IN ENGLAND TO DEFAUD PERSONS ABROAD

R. v. Owen and Others

Donovan, J. 18th May, 1956

Trial on indictment.

The defendants were charged on the first two counts of an indictment with conspiring to commit a common-law misdemeanour by conspiring to acquire lead, steel and copper in the Federal Republic of Germany by means of forged documents purporting to show that the metals would be consigned to and not re-exported from the Republic of Ireland, when, in fact, the metals were to be consigned and sold to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R., thereby evading the provisions of the Control of Goods (Import Certificates) Order, 1951, and acting "to prejudice the interests of honest English traders in such metals." On the third and fourth counts of the indictment the defendants were charged with a conspiracy to defraud an export control department of the Federal Republic of Germany (known as Z.A.K.) by causing Z.A.K., by means of forged documents purporting to be given by the Department of Industry and Commerce of the Republic of Ireland, and certifying that the metals would be imported into Ireland and not re-exported therefrom, to grant licences to export the metals from Germany, the defendants well knowing that the metals were, in fact, to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R. After counsel for the Crown had opened, counsel for the defendants moved to quash the first four counts of the indictment.

DONOVAN, J., said that counts 1 and 2, in effect, alleged a conspiracy to evade the Control of Goods (Import Certificates) Order, 1951, but the defendants avoided becoming amenable to that order simply by never importing the goods into the United Kingdom and never, in consequence, becoming holders of an import certificate. The order only applied to the holders of such a certificate. The phrase "acting to the prejudice of honest English traders" was lifted from *R. v. Newland* [1954] 1 Q.B. 158 where, the charge being a conspiracy to effect a public mischief, the consideration that honest English traders were injured by the conspiracy had relevance. In the present case, where public mischief was not the unlawful object alleged, the phrase was really little more than mere declamation. The first two counts also alleged unlawful means, but as they were the unlawful objects alleged in counts 3 and 4 of the indictment the first two counts were quashed. Counts 3 and 4 raised the question whether a conspiracy within the jurisdiction to defraud a person outside the jurisdiction by acts to be committed abroad was an indictable conspiracy in England. If such an unlawful object were to be effected in England, the conspiracy would clearly be indictable here. He regarded it as unlawful in English law to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country, as Z.A.K. could do. Since it was the agreement which constituted the crime, whether the unlawful object was effected or not, he could not see on principle how the conspiracy constituted by such an agreement became untriable here simply because the crime had been committed abroad. Logic and considerations of the public weal did not compel such a conclusion. Anomalies there might be, of course, but they existed whatever the true conclusion. There was no authority to compel one to hold the kind of conspiracy now under consideration as non-indictable here. It might be that hitherto the matter had been treated as clear. Indeed, in *R. v. Warburton* (1870), L.R. 1 C.C.R. 274, which was a case of conspiracy here to defraud a person in Germany by acts done there, the validity of the indictment was not challenged. In any event on principle he (his lordship) held that a conspiracy in this country to defraud persons in Germany in the way alleged in the present case was indictable here. Counts 1 and 2 quashed. Counts 3 and 4 upheld.

APPEARANCES: *Neville Faulks and David Hirst (Solicitor, Board of Trade)*; *C. Shawcross, Q.C., and Sebag Shaw (Stikeman & Co.)*; *A. Karmel, Q.C., and M. Mann (Galbraith & Best)*; *A. P. Marshall, Q.C., and W. Howard (Claude Hornby & Cox)*.

[Reported by Miss C. J. ELLIS, Barrister-at-Law] [3 W.L.R. 252]

Owing to circumstances beyond our control it was impossible to include page references to the Weekly Law Reports in our Notes of Cases published last week. We therefore give them below:—

Beevis v. Dawson	3 W.L.R. 161
Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.	1 W.L.R. 678
Commissioner of Stamp Duties of New South Wales v. Permanent Trustee Company of New South Wales	3 W.L.R. 152
Dirphys (Owners) v. Soya (Owners). The Soya	1 W.L.R. 714
Esdaile v. Lewis	1 W.L.R. 709

Georgia (Owners) v. Timandra (Owners). The Timandra	1 W.L.R. 691
Levermore v. Jobey	1 W.L.R. 697
London Hospital Governors v. Jacobs	1 W.L.R. 662
O'Connor v. Isaacs	3 W.L.R. 172
Quinn v. Horsfall & Bickham, Ltd.	1 W.L.R. 652
R. v. Campbell; <i>ex parte</i> Nomikos	1 W.L.R. 622
R. v. Reigate Justices; <i>ex parte</i> Holland	1 W.L.R. 638
St. Mark's Church, Lincoln, <i>In re</i>	3 W.L.R. 147
Simons v. W. H. Rhodes & Son, Ltd.	1 W.L.R. 642
Smyth v. Smyth	3 W.L.R. 210
Stafford Allen & Sons, Ltd. v. Pacific Steam Navigation Co.	1 W.L.R. 629

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time:—

Charity of Frances Barker and Certain Other Charities (City of York) Bill [H.C.]	[5th June.
Consolidated Municipal Charity and Certain Other Charities (Ludlow) Bill [H.C.]	[5th June.
Hospital of Robert Earl of Leicester Charity (Warwick) Bill [H.C.]	[5th June.
Manchester Ship Canal Bill [H.C.]	[7th June.
Medical Bill [H.L.]	[6th June.

To consolidate certain enactments relating to medical practitioners with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949.

Road Traffic Bill [H.C.]	[1st June.
Sutton's Hospital (Charterhouse) Charity Bill [H.C.]	[5th June.

Read Second Time:—

National Insurance Bill [H.C.]	[7th June.
Slum Clearance (Compensation) Bill [H.C.]	[7th June.

Read Third Time:—

Advocates' Widows' Fund Order Confirmation Bill [H.C.]	[7th June.
Barnsley Corporation Bill [H.L.]	[5th June.
Bristol Corporation Bill [H.C.]	[5th June.
Occasional Licences and Young Persons Bill [H.C.]	[5th June.

In Committee:—

Local Government Elections Bill [H.C.]	[6th June.
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B. QUESTIONS

CROWN PRIVILEGE FOR DOCUMENTS AND ORAL EVIDENCE

The LORD CHANCELLOR made the following statement: My lords, Her Majesty's Government have had under consideration for some time the whole problem of Crown privilege for documents and oral evidence. It is not a new problem, but has come into some prominence in recent years. This is not due to any extension of the principles on which privilege is claimed, but because since the Crown Proceedings Act, 1947, the Crown has been liable in tort or in delict and can be sued in the same way as private persons, and that has thrown into relief its privileged position with regard to the production of documents and other evidence.

I shall deal first with the position with regard to documents, which is the most important part of the subject, and then with oral evidence. The law in England, as laid down in the House of Lords' case of *Duncan v. Cammell Laird*, enables Crown privilege to be claimed for a document on two alternative grounds. The first ground is that the disclosure of the contents of the particular document would injure the public interest; for example, by endangering public security or prejudicing diplomatic relations. The second ground is that the document falls within a class which the public interest requires to be withheld from production, and Lord Simon particularised this head of public interest as "the proper functioning of the public service." The

Minister's certificate or affidavit setting out the ground of the claim must in England be accepted by the court.

In Scotland Crown privilege can be claimed on either of the two grounds that I have mentioned, but it is now clear, by virtue of the recent case of the *Glasgow Corporation v. The Central Land Board*, that the court in Scotland has an inherent power to override the Minister's certificate or affidavit. This power has long been claimed by Scottish courts, but as Lord Normand said in the *Glasgow Corporation* case—

"The power has seldom been exercised and the courts have emphatically said that it must be used with the greatest caution and only in very special circumstances."

As far as I know, it has been exercised only on two occasions in the last hundred years. The position in Scotland, therefore, although substantially different in principle, may not be very different in practice.

The claiming of Crown privilege on the first ground that I have mentioned has always been acceptable to the courts and public opinion. Where, however, the claim has been made on the ground that the document belongs to a class, especially in proceedings where the Crown's position seems very like that of an ordinary litigant, it has been criticised on the ground that the administration of justice is itself a matter of public interest and should be weighed against the other head of public interest, that is, "the proper functioning of the public service."

The reason why the law sanctions the claiming of Crown privilege on the "class" ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

It is sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a judge. This suggestion goes much further than the position in Scotland, where the power of the judge is only exercisable "in very special circumstances" and does not permit any examination of the ground of the claim. This ground, namely, "the proper functioning of the public service," must in our view be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a judge.

A judge assesses the importance of a particular document in the case that he is hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belongs. The result would be that the same kind of document would sometimes be protected and sometimes disclosed, which would, as I have said, be destructive of the whole basis of the class privilege.

I would emphasise that claims of Crown privilege are made in respect of all documents falling within the class, irrespective

of whether their production would be favourable or unfavourable to the Crown's interests. All Crown lawyers are familiar with cases in which the Crown's interests have in fact been prejudiced by the application of the rule.

The proper way to strike a balance between the needs of litigants and those of Government administration is, in our opinion, to narrow the class as much as possible by excluding from it those categories of documents which appear to be particularly relevant to litigation and for which the highest degree of confidentiality is not required in the public interest. We have carried out an extensive survey of the field, and have certain proposals to make along these lines.

A very large part of present-day Crown litigation consists of actions arising out of road accidents and other accidents involving Government employees, and accidents on Government premises. Where such an action is brought against a Government department, the most relevant documents are the reports of the employees involved and of other eye witnesses, and also subsequent reports made by the foreman, superintendent or other official as to such matters as the state of the machinery, premises or vehicle involved in the accident. In our opinion, Crown privilege ought not to be claimed for these documents, and we propose not to do so in the future.

I ought perhaps to make it clear that I am not referring to the report of a Government inspector, such as a factory inspector or mines inspector investigating an industrial or mining accident. In the case of such a report the department is not concerned as an employer or an owner of property, but is exercising governmental functions, and different considerations arise. We think that in this case the report should be privileged, but that the inspector should be allowed to give evidence on matters of fact.

Secondly, we have considered medical reports and records. In the recent case of *Ellis v. Home Office*, judicial criticism was directed at a claim for privilege for reports made by a prison doctor which might have been relevant to the claim for negligence against the Crown. Here we have two proposals to make. The first is that ordinary medical records kept by departments in respect of the health of civilian employees should not be the subject of Crown privilege. In the case of medical reports and records in the Fighting Services we consider that privilege should still be claimed, so far as proceedings between private litigants, usually matrimonial proceedings, are concerned. Service doctors owe a special duty to the commanding officer, and frank reports are essential. It is also important in the Services that a man should report readily to the medical officer, who is a doctor not of his choice but in whom he must have confidence; this is especially so in the case of venereal disease. Some of these considerations apply to prison doctors who owe a special duty to the prison governor, and their reports and records should still be privileged in proceedings between private litigants.

Where, however, the Crown or the doctor employed by the Crown is being sued for negligence, we propose that privilege should not be claimed. I should add, with regard to both proposals, that there may be reports of a specially confidential character which ought still to be privileged. We also propose that, if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed. At present many of these documents are made available only in the case of the more serious crimes, such as murder, manslaughter and rape.

In the *Ellis* case criticism was also made of a claim of privilege for a statement made to the police. Since that case a procedure has been established under which statements made by witnesses to the police are produced in court on subpoena in civil cases and may be furnished earlier with the consent or at the request of the witnesses themselves. This would prevent a recurrence of what occurred in the *Ellis* case. The only exception, made for obvious reasons, is for statements by "informers"—that is, by persons volunteering information about the commission of crimes.

In contract cases, the documents passing between parties are the most relevant and are always disclosed. Other documents which affect the legal position—for example, an authority to an agent—are also disclosed. Moreover, reports on matters of fact, as distinct from comment and advice, may be relevant to the issues in Government contract cases, and we propose that, where such a distinction can be clearly drawn, factual reports should be excluded from the privileged class. It may be that in other

fields, in addition to accident and contract proceedings, it will be possible to evolve new categories of documents of a factual nature, which, without prejudice to the public interest, can also be excluded.

We believe that our proposals will eliminate many of the grounds of complaint that have arisen in the past. I am assured by those responsible for Crown litigation that they will apply to the majority of cases coming before the courts. In the *Glasgow Corporation* case three earlier cases were criticised, and two of these would not have arisen under our present proposals—*Ellis v. Home Office* and *Smith v. The Lord Advocate*, which concerned a lorry driver's report. The third case, *Broome v. Broome*, concerned reconciliation work carried out by welfare officers acting for the Service authorities. This work is of the highest importance, especially where men are serving abroad, and in the Government's view it would be very unfortunate if it ceased to be protected by Crown privilege.

I come now to the category of departmental and inter-departmental minutes and memoranda containing advice and comment, and recording decisions—the documents by which the administrative machine thinks and works. Here we consider that Crown privilege must be maintained. An important type of case in which documents of this kind may be relevant is where the *vires* or legality of a Minister's decision is challenged and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case, it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced.

Minutes may also be relevant to proceedings because they may contain comments upon the issues in the case and the question of liability. They are not of high evidential value, although admittedly they may be used effectively in cross-examination. It can hardly be said that their non-disclosure prejudices the administration of justice, and their disclosure would in our opinion prejudice Government administration. For example, such actions as wrongful imprisonment, malicious prosecution or defamation, may easily be concerned with events of public interest which give rise to comment in the Press and questions in Parliament. It is necessary and right that advice should be given at a high level in such cases, and that the advice should be entirely frank. It could not easily be given if it were subject to discovery in the subsequent proceedings.

It is often said that a big commercial company is in much the same position as a Government department. In so far as this resemblance exists our proposals recognise it. In many fields, however, the Minister's responsibility to Parliament and the governmental nature of his functions inevitably results in very different methods from those of a commercial company. As Sir Ernest Gowers has said, in a somewhat different context—

"Civil Service methods are often contrasted unfavourably with those of business. But to do this is to forget that no board of directors of a business concern have to meet a committee of their shareholders every afternoon, to submit themselves daily to an hour's questioning on their conduct of the business, to get the consent of that committee by a laborious process to every important step they take, or to conduct their affairs with the constant knowledge that there is a shadow board eager for the shareholders' authority to take their place. The systems are quite different and are bound to produce different methods."

I now turn briefly to oral evidence. It is plainly established and accepted that oral evidence of the contents of privileged documents cannot be admitted. As regards evidence of oral communications, Crown privilege is claimed, much more rarely, on the same principles as in the case of written communications. It would be absurd, for example, if privilege could be claimed for a confidential minute passing from one official to another but not for a confidential conversation between them. The proposals that we are making for reducing the scope of privilege for documents would apply to oral communications of the same kind.

I must apologise for trespassing so much on your lordships' time, but this matter is important to the administration of justice, and your lordships have always been kind when I have had proposals of this kind to put forward. [6th June.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Governors' Pensions Bill [H.C.] [5th June.
To amend the Pensions (Governors of Dominions, &c.) Acts,
1911 to 1947.

Read Second Time :—

Copyright Bill [H.L.] [4th June.
London Necropolis Bill [H.L.] [4th June.

Read Third Time :—

Rugby Corporation Bill [H.C.] [4th June.

In Committee :—

Finance (No. 2) Bill [H.C.] [7th June.

B. QUESTIONS

LEGAL ADVICE

The ATTORNEY-GENERAL said that the Lord Chancellor was considering the observations of the Select Committee on Estimates about the advantages of implementing s. 5 of the Legal Aid and Advice Act, 1949. Whether the Committee's conclusions as to the economy which might result from the institution of a legal advice scheme were well founded was, perhaps, somewhat open to doubt. [4th June.

LEGAL AID IN THE HOUSE OF LORDS

The ATTORNEY-GENERAL said that the Government could not at present contemplate extending legal aid to litigants whose cases proceeded to the House of Lords. The cost which would benefit perhaps one or two individuals might, with advantage, be more usefully employed in giving aid and assistance in inferior courts. [4th June.

SUMMARY TRIAL OF MINOR OFFENCES (LEGISLATION)

The HOME SECRETARY said that progress had been made in drafting legislation to implement the recommendations of the Departmental Committee on the Summary Trial of Minor Offences but he did not think time could be found for the Bill this session. [7th June.

TRADING FROM VANS (CLOSING HOURS)

The HOME SECRETARY said that legislation would be introduced as soon as practicable to revise the law as regards trading otherwise than in shops. [7th June.

STATUTORY INSTRUMENTS

Bahrain (Amendment) Order, 1956. (S.I. 1956 No. 827.) 5d.

Civil Defence (Designation of the Minister of Housing and Local Government) Order, 1956. (S.I. 1956 No. 824.) 5d.

Dangerous Drugs Act, 1951 (Application) Order, 1956. (S.I. 1956 No. 817.) 5d.

Export of Goods (Control) (Amendment No. 6) Order, 1956. (S.I. 1956 No. 789.)

Exportation of Horses (Minimum Values) Order, 1956. (S.I. 1956 No. 780.)

Foreign Compensation (Czechoslovakia) (Amendment) Order, 1956. (S.I. 1956 No. 831.) 5d.

Foreign Compensation (Yugoslavia) (Amendment) Order, 1956. (S.I. 1956 No. 832.) 5d.

Import Duties (Drawback) (No. 6) Order, 1956. (S.I. 1956 No. 801.)

Kuwait (Amendment) Order, 1956. (S.I. 1956 No. 828.) 5d.

Leeward Islands (Miscellaneous Provisions) Order in Council, 1956. (S.I. 1956 No. 833.) 5d.

London Quarter Sessions (Juvenile Court Appeals) Order, 1956. (S.I. 1956 No. 790 (C. 2).)

London Traffic (Prohibition of Waiting) (High Street, Dorking) Regulations, 1956. (S.I. 1956 No. 807.)

London Traffic (Prohibition of Waiting) (Riverhead) Regulations, 1956. (S.I. 1956 No. 792.)

London Traffic (Unilateral Waiting) (No. 3) Regulations, 1956. (S.I. 1956 No. 793.) 6d.

Nigeria (Constitution) (Amendment) Order in Council, 1956. (S.I. 1956 No. 836.) 6d.

Nyasaland (No. 2) Order in Council, 1956. (S.I. 1956 No. 834.) 5d.

Parliamentary Constituencies (Blackpool and North Fylde) Order, 1956. (S.I. 1956 No. 818.) 5d.

Parliamentary Constituencies (Bradford and Shipley) Order, 1956. (S.I. 1956 No. 819.) 5d.

Parliamentary Constituencies (Colchester, Maldon and Saffron Walden) Order, 1956. (S.I. 1956 No. 820.) 5d.

Parliamentary Constituencies (Eccles and Farnworth) Order, 1956. (S.I. 1956 No. 821.) 5d.

Parliamentary Constituencies (Kingston upon Hull and Bridlington) Order, 1956. (S.I. 1956 No. 822.) 5d.

Parliamentary Constituencies (Nottingham) Order, 1956. (S.I. 1956 No. 823.) 5d.

Qatar (Amendment) Order, 1956. (S.I. 1956 No. 829.) 5d.

Registration of Title (City of Leicester) Order, 1956. (S.I. 1956 No. 826.) 5d. See p. 424, *ante*.

Retention of Cable, Mains and Pipes under Highways (Huntingdonshire) (No. 1) Order, 1956. (S.I. 1956 No. 794.)

Retention of Pipes under Highway (Gloucestershire) (No. 1) Order, 1956. (S.I. 1956 No. 796.)

Sea Fisheries (Scotland) Byelaw (No. 54), 1956. (S.I. 1956 No. 810 (S. 39).) 5d.

Seal Fisheries (Crown Colonies and Protectorates) (Amendment) Order in Council, 1956. (S.I. 1956 No. 838.)

Stamped or Pressed Metalwares Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 857.) 6d.

Stopping up of Highways (Bradford) (No. 2) Order, 1956. (S.I. 1956 No. 795.)

Stopping up of Highways (Devon) (No. 1) Order, 1956. (S.I. 1956 No. 805.)

Stopping up of Highways (Essex) (No. 15) Order, 1956. (S.I. 1956 No. 840.) 5d.

Stopping up of Highways (Hertfordshire) (No. 6) Order, 1956. (S.I. 1956 No. 804.)

Stopping up of Highways (Huntingdonshire) (No. 1) Order, 1956. (S.I. 1956 No. 841.)

Stopping up of Highways (Lancashire) (No. 5) Order, 1956. (S.I. 1956 No. 842.) 5d.

Stopping up of Highways (Lancashire) (No. 7) Order, 1956. (S.I. 1956 No. 797.)

Stopping up of Highways (Lancashire) (No. 8) Order, 1956. (S.I. 1956 No. 812.)

Stopping up of Highways (Leicestershire) (No. 12) Order, 1956. (S.I. 1956 No. 843.) 5d.

Stopping up of Highways (Lincoln—Parts of Kesteven) (No. 2) Order, 1956. (S.I. 1956 No. 844.) 5d.

Stopping up of Highways (Lincolnshire—Parts of Kesteven) (No. 3) Order, 1956. (S.I. 1956 No. 806.)

Stopping up of Highways (London) (No. 14) Order, 1956. (S.I. 1956 No. 783.)

Stopping up of Highways (Surrey) (No. 1) Order, 1956. (S.I. 1956 No. 784.)

Stopping up of Highways (Surrey) (No. 6) Order, 1956. (S.I. 1956 No. 798.)

Stopping up of Highways (Warwickshire) (No. 6) Order, 1956. (S.I. 1956 No. 811.)

Stopping up of Highways (West Riding of Yorkshire) (No. 15) Order, 1956. (S.I. 1956 No. 845.) 5d.

Transfer of Functions (Civil Defence) Order, 1956. (S.I. 1956 No. 825.)

Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956. (S.I. 1956 No. 835.) 11d.

Trucial States (Amendment) Order, 1956. (S.I. 1956 No. 830.) 5d.

Wages Regulation (Industrial and Staff Canteen Undertakings) (Amendment) Order, 1956. (S.I. 1956 No. 856.) 5d.

West Indian Court of Appeal (Expenses) (Amendment) Order in Council, 1956. (S.I. 1956 No. 837.) 5d.

West of Southampton—Salisbury—Bath Trunk Road (Brickworth Park, near Salisbury, Diversion) Order, 1956. (S.I. 1956 No. 813.)

York-Hull Trunk Road (Kexby Diversion) Order, 1956. (S.I. 1956 No. 839.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

Miscellaneous

The President of The Law Society, Mr. W. Charles Norton, gave a luncheon party on 4th June at 60 Carey Street, Lincoln's Inn. The guests were: The French Ambassador, Mr. Justice Glyn-Jones, Mr. C. H. Aslin, Mr. V. M. R. Goodman, Mr. Roland Marshall, Mr. H. B. Lawson and Mr. T. G. Lund.

DEVELOPMENT PLANS

(Other development plans: see p. 444, ante.)

COUNTY BOROUGH OF WEST HAM DEVELOPMENT PLAN

On 22nd May, 1956, the Minister of Housing and Local Government approved with modifications the above plan.

A certified copy of the plan as approved by the Minister has been deposited at the West Ham Town Hall, Stratford, E.15. The copy so deposited will be open for inspection free of charge by all persons interested between the hours of 9.30 a.m.—4.30 p.m. Mondays to Fridays and 9.30 a.m.—12 noon Saturdays.

The plan became operative as from 1st June, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan he may, within six weeks from 1st June, 1956, make application to the High Court.

THE LAW SOCIETY

HONOURS EXAMINATION

MARCH, 1956

At the examination for Honours of candidates for admission on the Roll of Solicitors of the Supreme Court, the Examination Committee recommended the following as being entitled to Honorary Distinction: *First Class*: None. *Second Class* (in alphabetical order): P. J. Arkus, W. Bowey, M. V. Carey, B.A. (Cantab.), E. W. T. Dalkin, A. J. P. Dickinson, LL.B. (Manchester), J. W. Elven, B.A., LL.B. (Cantab.), A. M. Gwilliam, I. G. Harrison, M. T. Hughes, M.A. (Oxon.), G. C. Lindsay, LL.B. (Liverpool), A. M. Midgen, P. R. Milligan, LL.B. (Leeds), P. G. Mortimer, B.A. (Oxon.), R. B. Taylor. *Third Class* (in alphabetical order): P. W. Battle, B. I. Bennett, G. M. Britton, LL.B. (London), M. F. Flint, J. Gordon, LL.B. (London), A. G. Harvey, C. P. Hillman, G. R. Humphries, I. M. McLachlan, I. M. O. McMullan, R. R. Maddison, B.A. (Cantab.), H. W. W. Paine, B.A. (Oxon.), J. C. Parkinson, G. B. Peacock, LL.B. (Leeds), A. J. G. Perlman, R. Sells, K. H. N. Sparkes, P. N. Sparling, LL.B. (Leeds), A. Thelwell, R. D. Walker. The Council have given Class Certificates to the candidates in the Second and Third Classes. Eighty candidates gave notice for examination.

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